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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 605

WILMOT W. TREW,

Petitioner,

vs.

DAN E. GARVEY, AS SECRETARY OF STATE OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

May it please the court:

The petition of Wilmot W. Trew of Phoenix, Arizona respectfully shows:

I

Record

That this petition for Writ of Certiorari is accompanied by a certified transcript of the record in the case, including the proceedings in the Supreme Court of the State of Arizona, to which court the Writ is asked to be directed.

II

Summary

The First Special Session of the 17th Legislature of the State of Arizona in 1945 enacted Chapter 11, House Bill 20 as an ordinary measure, not as an emergency measure. The measure was approved by the Governor of Arizona on the 3d day of October, 1945. (Opinion, Tr. 42)

"Within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Opinion, Tr. 43) ordering House Bill 20, entitled:

> "Chapter 11, House Bill No. 20, an act relating to public utilities; providing for the establishment of a rate-making base for public service corporations furnishing gas and electricity; providing for the cooperation of the Federal Power Commission, and making an appropriation."

referred to a vote of the qualified electors of Arizona for their approval or rejection at the polls at the next regular general election.

Garvey, the secretary of state, issued his official receipt for said referendum petitions, showing them to have been filed by him at 3:15 P. M. on December 26, 1945 (Tr. 7-8).

On January 4, 1946 Garvey, in his official capacity as secretary of state, wrote the proponent of said referendum petitions, saying, "Upon the advice of the attorney general, I have come to the conclusion that Chapter 11, House Bill No. 20, cannot be referred to a vote of the people because it is for the support and maintenance of the Corporation Commission, a department of the state government created by the Constitution of Arizona, in the discharge of its constitutional duties. Accordingly I decline to file * * *

the said petitions * * *. In my judgment the referendum petition is ineffective for all purposes and I will not recognize it as valid unless ordered to do so by a court of competent jurisdiction." (Tr. 9)

Petitioner Trew, as plaintiff, commenced an action against Dan E. Garvey, as Secretary of State of the State of Arizona, in the Superior Court of Maricopa County, Arizona on the 11th day of January, 1946 for the *sole and only* purpose of compelling Garvey, as secretary of state, to file as of December 26, 1945 the referendum petitions, or, in the alternative, for a declaratory judgment, decreeing that he had filed them in his office on the 26th day of December, 1945. *No other or additional relief was sought by the action,* (Tr. 1-11) *or authorized by Sec. 60-105, Arizona Code 1939.*

"Upon the complaint and application of appellee, as plaintiff, an alternative writ of mandamus was issued by the superior court, requiring the appellant, the defendant, to file the referendum petition or show cause for failure to do so." Upon issue joined and after hearing the writ was made permanent. From the final order and judgment of the court, the defendant appealed." (Tr. 43)

The Supreme Court of Arizona on the 28th day of June, 1946 filed its opinion and, in accordance therewith, ordered the judgment of the trial court in the cause reversed, and directed the entry of judgment for Garvey, as secretary of state (Tr. 41-2).

Seasonably, Petitioner Trew filed his motion for a rehearing in said Supreme Court of Arizona and on July 12, 1946 said court denied said motion for rehearing (Tr. 41).

III

Short Statement of Matters Involved

1. The jurisdiction and power of the judicial branch of the government of Arizona, acting through the Supreme Court of Arizona, the court of last resort:

(a) To stop the people of Arizona from proceeding to exercise, at their own option, their reserved power under Article 4, Part 1, Section 3 of the Constitution of Arizona to approve or reject at the polls any act of the Arizona legislature;

(b) To construe the Arizona statute, Sec. 60-105, Arizona Code 1939, and the Arizona Constitution, Article 4, Part 1, Section 3, so as to arrogate to itself the power to declare an act unconstitutional before the legislative department of the state government has enacted it and while the passage of the act is being considered; and so as to render said statute and Constitution repugnant to the Constitution of the United States and to the Enabling Act, approved June 20, 1910, (36 Stat., 557-572), under which Enabling Act Arizona was admitted to statehood; and so as to destroy the republican form of government in Arizona, mandatorily required to be maintained by said Enabling Act and the Constitution of the United States;

(c) To take from the qualified electors of Arizona their reserved power under Article 4, Part 1, Section 3 of the Constitution of Arizona, by the use of the referendum, to review and approve or reject any act passed by the Arizona legislature as an ordinary act and not as an emergency act to provide appropriations for the support and maintenance of the departments of the state and all state institutions;

(d) To prevent the legislative branch of the state government of Arizona from functioning;

(e) To construe the Constitution of Arizona so as to render it repugnant to the Constitution of the United States, the Arizona Enabling Act, and so as to destroy the republican form of government in Arizona; and

(f) To decide constitutional issues not involved in the pleadings and unauthorized by Sec. 60-105, Arizona Code 1939, or in the case, so as to stop the people of Arizona actually engaged therein from exercising, at their own option, their reserved power under Article 4, Part 1, Section 3 of the Arizona Constitution to review and approve or reject, at the polls, any act of the Arizona legislature.

2. The jurisdiction of the Supreme Court of Arizona to affirm the action of the secretary of state, a mere ministerial officer, in abridging the privileges of Petitioner and the people of Arizona—citizens of the United States, of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature, by deciding that the act was not one that might be referred to a vote of the people at the polls, by the use of the referendum, and thus depriving them of their property without due process of law by subjecting their property to taxation under an act never finally passed by the legislative department of the government of Arizona.

3. The jurisdiction of the Supreme Court of Arizona to construe Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Constitution of Arizona so as to give to the secretary of state, a mere ministerial officer, the power and authority:

(a) To judge and decide the meaning and application of said statute and constitutional provision and, by such

decision, to stop the people of Arizona from continuing in the exercise of their reserved power, at their option, to approve or reject, at the polls, any act of the Arizona legislature;

(b) To disregard the meaning and effect of said statute and constitutional provision as theretofore interpreted and declared by the court of last resort in Arizona; and

(c) To disregard the declared meaning of the laws of Arizona by the court of last resort and, by so disregarding the declared meaning of the laws of Arizona, to compel interested citizens and electors, each time they, at their option, elect by the use of the referendum, at the polls, to approve or reject any act of the Arizona legislature, to resort again to the courts for another declaration of the meaning of said statute and constitutional provision by the court of last resort, and to compel the performance by the secretary of state of a mere ministerial duty, necessary to be performed to enable the people to exercise their said reserved power.

4. The jurisdiction and power of the Supreme Court of Arizona in an action commenced under Sec. 60-105, Arizona Code 1939, *only* to direct the filing of referendum petitions, or, in the alternative, under Article 7, Sections 27-701-6, Arizona Code 1939, *only* to enter a declaratory judgment that referendum petitions had been filed, to decide constitutional questions not embraced in the pleadings or in the case, so as to deprive Petitioner and all taxpayers in Arizona of their property without due process of law by subjecting their property to taxation under a law never finally enacted, and so as to abridge the people's right under their reserved power, Article 4, Part 1, Section 3 of the Constitution of Arizona, at their option, to review

and approve or reject, at the polls, any act of the Arizona legislature.

IV

Reasons Relied upon for the Allowance of the Writ

The reasons relied upon by Petitioner for the allowance of the writ sought are:

First: No court has ever had jurisdiction to stop legislative bodies from legislating. Jurisdiction attaches after legislation, not before legislation, and not during the process of legislation. It is only after an act has been finally enacted that the courts have jurisdiction to determine its constitutionality. Therefore, the Supreme Court of Arizona exceeded its jurisdiction in stopping a part of the legislative branch of the government or Arizona, viz: the electorate, from functioning while engaged in the process of legislation and before it has completed the passage of the law, either by approving or rejecting the act of the legislature, the other part of the legislative department of the state government.

Second: Because the decision of the Supreme Court of Arizona stops the qualified electors of Arizona (they being a part of the legislative branch of the government of Arizona) from reviewing, by the use of the referendum, and approving or rejecting at the polls an act of the legislature.

Third: Because the decision of the Supreme Court of Arizona prevents the exercise by the legislative branch of the government of Arizona of powers properly belonging exclusively to it.

Fourth: Because the decision of the Supreme Court of Arizona construes an Arizona statute and the Constitution of Arizona so as to render the statute and Constitution

repugnant to the Constitution of the United States and repugnant to Section 20 of the Enabling Act (36 Stat., 557-572), under which Enabling Act Arizona was admitted to statehood.

Fifth: Because the decision of the Supreme Court of Arizona destroys the republican form of government in Arizona.

Sixth: Because the decision of the Supreme Court of Arizona abridges the privileges of petitioner and the qualified electors of Arizona, who are citizens of the United States, of exercising the reserved powers granted to them by Article 4, Part 1, Section 3 of the Constitution of Arizona, and deprives Petitioner and all taxpayers of Arizona of their property through taxation without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Seventh: Because the questions decided by the Supreme Court of Arizona are outside of any issues embodied in the pleadings, or in the case.

Eighth: Because the only power and authority within the jurisdiction of the Supreme Court of the State of Arizona under Sec. 60-105, Arizona Code 1939, is to compel the secretary of state to file the referendum petitions, where, as here, the Supreme Court of Arizona finds that

> "within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Opinion, Tr. 43.)

Ninth: Because the decision of the Supreme Court of Arizona confirms authority in the secretary of state, a mere ministerial officer, to judge and decide the meaning and application of the Arizona Constitution.

Tenth: Because the decision of the Supreme Court of Arizona authorizes the secretary of state, a mere ministerial officer, to disregard the construction of the Constitution by the court of last resort in Arizona.

Eleventh: Because the decision of the Supreme Court of Arizona approves the refusal of the secretary of state, a mere ministerial officer, to perform ministerial duties, clearly defined by the decisions of the court of last resort in Arizona.

Twelfth: Because the decision of the Supreme Court of Arizona gives to the secretary of state, a mere ministerial officer, jurisdiction, power and authority to refuse to recognize the law as interpreted and declared by the court of last resort—power and authority denied to all inferior courts, which are bound in their decisions to follow the law as adjudicated by such court.

Thirteenth: Because the decision of the Supreme Court of Arizona sanctions the disregard by the secretary of state of the meaning of the law, constitutional and statutory, as established by the decisions of the court of last resort, and in so doing enables the secretary of state to force citizens, electors and taxpayers to resort to the courts again and again to compel the performance of mere ministerial duties.

Wherefore, petitioner respectfully asks that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Arizona, commanding said court to certify and send to this court a full and complete transcript of the record of the case and all proceedings in the Supreme Court of the State of Arizona in the case numbered and entitled on its docket No. 4889, Dan E. Garvey, as Secretary of State of the State of Arizona, appellant, *v.* Wilmot W. Trew, appellee, to the end

that this cause may be reviewed and determined by this court, as provided by the Statutes of the United States, and that the judgment of said Supreme Court of the State of Arizona be reversed by this court; and your petitioner asks that the certified transcript of the record of the case and the proceedings in the Supreme Court of the State of Arizona filed with this petition may be treated as a return to said Writ of Certiorari, and your petitioner asks that he may have such other and further remedies in the premises as to this court may seem appropriate and in conformity with law.

WILMONT W. TREW,
Petitioner.
HENDERSON STOCKTON,
Counsel for Petitioner.
S. N. KARAM,
LAURENS L. HENDERSON,
of Counsel for Petitioner.

STATE OF ARIZONA,
County of Maricopa, ss:

HENDERSON STOCKTON, being upon his oath first duly sworn, deposes and says: that he is counsel for petitioner in the above and foregoing Petition for Writ of Certiorari and that, in his opinion, the said above and foregoing petition is well founded; and that said above and foregoing petition is not interposed for delay.

HENDERSON STOCKTON.

Subscribed and sworn to before me this 2d day of October, 1946.

THELMA S. MILLS,
Notary Public.

My commission expires June 19, 1950. (Seal.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The opinion of the Supreme Court of Arizona is reported in 170 P. 2d, 845, and appears in the Transcript of Record at pages 42 to 57.

II

Jurisdiction

1. Jurisdiction to grant certiorari is conferred by Sec. 237(b), Judicial Code, 28 U. S. C. A., Sec. 344(b).

The date of the judgment to be reviewed is June 28, 1946 (Tr. 41) and the date of denial of motion for rehearing is July 12, 1946 (Tr. 41).

2. The specific claims advanced, and rulings made in the lower court which are relied upon as the basis of this Court's jurisdiction, are as follows:

Petitioner contended in the court below that the people, at the polls, had the right by the use of the referendum to review the act of the legislature and approve or reject it; that neither the secretary of state nor the court had jurisdiction to assume in advance of the action of the people the power or right to determine whether a proposed measure was valid or invalid, or whether an act of the legislature was one that might be referred to a vote of the people by the use of the referendum; that the only jurisdiction, power or authority possessed by the secretary of state or the court was to determine if the referendum petition was legally sufficient and if the referendum petition was found legally sufficient, under Sec. 60-105, Arizona Code 1939 it was the plain duty of the secretary of state to file it, and

the court, under said section, had no jurisdiction, power or authority to do more than compel the secretary of state to file the referendum petition, or under Article 7, Sec. 27-701-6, Arizona Code 1939 to enter a declaratory judgment that the referendum petition had been filed by the secretary of state.

These contentions of petitioner were rejected by the court.

The court went outside of and beyond the issues framed by the pleadings in the case (Tr. 1-11) and acted without and in excess of its jurisdiction in decreeing in advance that the act of the legislature was not one that might be referred by the use of the referendum for approval or rejection at the polls by the people (Tr. 42-57, Opinion), upon the ground that the act was an appropriation measure for the support and maintenance of a department of state (Tr. 46, Opinion), and that such an act was not referrable by the use of the referendum, although the act was passed only as an ordinary law and not as an emergency act (Tr. 54, Opinion).

The decision of the Supreme Court of Arizona abridges the privileges of the people of Arizona, citizens of the United States, to legislate, and deprives petitioner, the electors and taxpayers of Arizona, of their property without due process of law by subjecting it to taxation under a law never finally enacted, all in violation of the 14th Amendment to the Constitution of the United States.

The decision of the Supreme Court of Arizona gives to Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution a meaning rendering both repugnant to the Constitution of the United States and Sec. 20 of the Enabling Act (36 Stat. 557-572), and a meaning which destroys the republican form of government in Arizona by stopping the legislative department of the gov-

ernment of Arizona from functioning while it was proceeding to legislate.

The decision of the Supreme Court of Arizona reversed a former decision holding to the contrary and confirmed in the secretary of state, a mere ministerial officer, the jurisdiction, power and authority, withheld from every inferior court in Arizona, to disregard the meaning of Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution, as declared by the court of last resort.

3. The statutory provisions under which the jurisdiction of the court is invoked are Sec. 237(b), Judicial Code, 28 U. S. C. A., Sec. 344(b).

4. The cases believed to sustain the jurisdiction are:

Commonwealth of Massachusetts v. *Mellon*, 262 U. S. 447, 67 L. Ed. 1078;
State v. *Osborn*, 16 Ariz. 247, 143 P. 117;
Martin v. *Hunter's Lessee*, 14 U. S. 304, 1 Wheat. 304, 4 L. Ed. 97.

III

Statement of the Case

A full statement of the case has been made in the petition for certiorari under the heading, "II. Summary", and in the interest of brevity the statement is not here repeated. (See pages 11 to 26 of petition for certiorari, made a part hereof.)

IV

Specification of Errors

1. The court erred in ascribing a meaning to Sec. 60-105, Arizona Code, 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution which (a) renders both repugnant

to the Constitution of the United States and the Enabling Act, pursuant to which Arizona was admitted to statehood; (b) destroys the republican form of government in Arizona; (c) abridges the privileges of petitioner and the people of Arizona—citizens of the United States, of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature; and (d) deprives petitioner and all taxpayers of Arizona of their property without due process of law by subjecting their property to taxation under an act never finally passed by the legislative department of the government of Arizona, because the effect of the decision is to deprive one branch of the legislative department, *i. e.*, the people of the state, from legislating and stops them in the act of legislating, and because the effect of the decision approves the taxation of the property of petitioner and other property owners in Arizona under a law never finally enacted.

The assumption of power to pass upon the validity or constitutionality of an act of the legislative department before the enactment is complete destroys the republican form of government, for free legislation by the legislative department of a state is indispensable to the maintenance of the republican form of government.

2. The Supreme Court of Arizona erred in not directing the secretary of state to file the referendum petitions, or in failing to enter a declaratory judgment that the referendum petitions had been filed, for the following reasons:

(a) Because the jurisdiction of the court under Sec. 60-105, Arizona Code, 1939, is limited to the sole issue of whether or not the referendum petitions were legally sufficient (conformed with the requirements of the law as to form and signature) and, if found legally sufficient, to direct the filing thereof, or to enter a declaratory judgment that the referendum petitions had been filed;

(b) Because the only issue in the pleadings and in the case was whether the referendum petitions were legally sufficient (conformed to the requirements of the law as to form and signature). If found legally sufficient, the jurisdiction of the court was limited to directing that they be filed, or, in the alternative, decreeing that they had been filed; and

(c) Because the court determined that the referendum petitions were legally sufficient, viz., that they conformed with the requirements of the law as to form and signature.

3. The court erred in sanctioning the assumption of jurisdiction, power and authority by the secretary of state:

(a) To disregard the meaning of the law, constitutional and statutory, as established by the decisions of the court of last resort;

(b) To himself interpret the statutory and constitutional provisions contrary to their declared meaning by the court of last resort; and

(c) To stop a part of the legislative department, viz., the people, from legislating, and forcing the people, qualified electors and taxpayers, to resort to the courts to compel the performance of a mere ministerial duty.

The error is apparent because the secretary of state is a ministerial officer and if referendum petitions legally sufficient (conforming with the requirements of the law as to form and signature) are presented to him, it is his plain duty to file them. He is without jurisdiction, power or authority to determine the constitutionality of any act, or if any act may be referred, by the use of the referendum, to a vote of the people.

4. The court erred in assuming the jurisdiction, power and right in advance of the final enactment of a law by a

part of the legislative department of the state, viz., the people, to decide whether the act sought to be referred by the use of the referendum to a vote of the people was valid or invalid, or was an act that might or might not be so referred, thereby stopping such part of the legislative department from legislating while they were actually engaged in the process of legislation.

The error plainly appears because the courts are without jurisdiction to stop legislative bodies from legislating. The jurisdiction of the court attaches only after legislation, not before legislation, and not during the process of legislation. It is then and then only (after an act has been finally enacted) that the court has jurisdiction to determine its constitutionality and validity. Furthermore, the only relief sought by petitioner was a judgment to compel the secretary of state to file the referendum petitions, or a declaratory judgment that they had been filed. No other issues were in the pleadings, or in the case.

The court's decision went outside of the issues and the court acted without and in excess of its jurisdiction.

Brief of Argument

The decision of the court below abridges the privileges of the people of Arizona and petitioner of the use of their reserved power, at their option, at the polls to approve or reject an act of the legislature, and deprives petitioner and all taxpayers of Arizona of their property without due process of law.

The people of Arizona are a part of its legislative body. The decision of the court below, by ascribing a meaning to the applicable constitutional and statutory provisions that stops the people from legislating by the use of the referendum, not only renders both repugnant to the Constitution of the United States and to the Enabling Act, under

which Arizona was admitted to statehood, but destroys the republican form of government in Arizona.

The court below was without jurisdiction in sanctioning the acts of the secretary of state which stopped the people from legislating. It is only after legislation, not before legislation, and not during the process of legislation, that a court has jurisdiction to determine the validity of a law, or if an act of the legislature may be referred to a vote of the people by the use of the referendum.

The secretary of state and the court below had jurisdiction only to determine the legal sufficiency of the referendum petitions (whether they conformed with the requirements of law as to form and signature). Finding the referendum petitions legally sufficient, the jurisdiction of the court below was limited to ordering them filed.

V

Argument

For conciseness, the specified errors will be treated together.

Section 20 of the Enabling Act (36 Stat. 557-572) among other things provides:

> "that the delegates to the Convention * * * shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States * * *. The Constitution shall be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Constitution of Arizona, Article 3, provides:

> "The powers of the government of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this constitution, such depart-

ments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

The Constitution of Arizona in Article 4, part 1, provides:

Sec. 1. "The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."

Sec. 3. "* * * the legislature, or five per centum of the qualified electors, may order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the legislature, except laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the state government and state institutions; Provided, that no such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative, and shall be approved by the affirmative votes of two-thirds of the members elected to each house of the legislature, taken by roll call of ayes and nays, and also approved by the governor; and should such measure be vetoed by the governor, it shall not become a law unless it shall be approved by the votes of three-fourths of the members elected to each house of the legislature, taken by roll call of ayes and nays."

Sec. 4. "All petitions submitted under the power of the initiative shall be known as Initiative Petitions, and shall be filed with the secretary of state not less than four months preceding the date of the election at which the measures so proposed are to be voted upon. All

petitions submitted under the power of the referendum shall be known as Referendum Petitions, and shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislature, which shall have passed the measure to which the referendum is applied. The filing of a referendum petition against any item, section, or part of any measure shall not prevent the remainder of such measure from becoming operative."

Sec. 5. "* * * any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise."

Sec. 9. "Every * * * referendum petition shall be addressed to the secretary of state in the case of petitions * * * on state measures * * *; and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state, his post-office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant and that in the belief of the affiant each signer was a qualified elector of the state, * * *."

The Constitution of the United States in Article 4, Section 4, provides:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

It is provided in the 14th Amendment to the Constitution of the United States:

> "Sec. 1. "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The duties of the secretary of state are enumerated in Sec. 4-201, Arizona Code, 1939. It is deemed unnecessary to quote the enumerations and we content ourselves by the assertion that he is made a mere ministerial officer. We think this statement will not be challenged.

The Arizona law makes it the duty of the Secretary of State to receive and file referendum petitions. Sec. 60-105, Arizona Code, 1939, provides:

> "If the secretary of state shall refuse to accept and file any petition for the initiative or for the referendum or proposal for a constitutional amendment which has been presented within the time prescribed, any citizen may apply, within ten (10) days after such refusal, to the superior court for a writ of mandamus to compel him to do so. If the court find that such petition is legally sufficient, the secretary shall then file it, with a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office; if any petition filed is not legally sufficient, the court may enjoin the secretary or other officers from certifying or printing on the official ballot for the ensuing election the measure proposed or referred. Such actions shall be advanced on the docket and heard and decided by the court as quickly as possible. Either party may appeal to the Supreme Court within ten (10) days after judgment. The superior court of Maricopa county shall have jurisdiction in all measures to be submitted to the electors of the state at large; in cases of local and special measures, the

> superior court of the county, or of one of the counties in which such measures are to be voted upon, shall have jurisdiction."

That legally sufficient referendum petitions were timely presented to the secretary of state for filing appears from the opinion of the court below:

> "Within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Tr. 43, Opinion.)

When referendum petitions were presented to the secretary of state, the only duty placed upon him was to determine if the petitions were legally sufficient. He had no right to do more, or less. Instead, however, of performing his plain ministerial duty, he arrogated to himself the power and authority to decide that the act of the legislature in question was not one that could be referred to a vote of the people by the use of the referendum.

On September 18, 1914 the Supreme Court of Arizona in the case of *State* v. *Osborn*, 16 Ariz. 247, 143 P. 117, declared the meaning of the phrase, "legally sufficient", found in Sec. 60-105, Arizona Code, 1939, quoted above, in the following language:

> "We conclude * * * that the words 'legally sufficient' as used in paragraph 3327, R. S. 1913, mean that petitions which conform with the requirements of law as to form and signature."

Paragraph 3327, R. S. 1913, is now Sec. 60-105, Arizona Code 1939, without any material change.

Notwithstanding, the secretary of state assumed the power and authority to declare the meaning of Article 4, part 1, section 3 of the Arizona Constitution to be directly opposite of the meaning declared by the Supreme Court

of Arizona in the case of *Warner* v. *White*, 39 Ariz. 203, 4 P. 2d, 1000, decided October 28, 1931. He thus forced petitioner, or any other interested citizen, to file the action authorized by Sec. 60-105, Arizona Code 1939, above quoted.

The only action authorized was one to compel him to file the referendum petitions and the only jurisdiction and power of the court was to determine if the petitions were "legally sufficient" and, if found legally sufficient, to require that they be filed.

The trial court required the filing of the referendum petitions because they were legally sufficient. The Supreme Court went outside of and beyond the issues in the case and assumed jurisdiction that no court possesses. Surely it is established beyond legitimate argument that the courts are without jurisdiction to stop legislative bodies from legislating and that jurisdiction of the court attaches only after legislation, not before legislation, and not during the process of legislation. It was on September 18, 1914, at the threshold of statehood, that the Supreme Court of Arizona in a very clear and well-considered opinion in the case of *State* v. *Osborn, supra* so decided. The principle is clearly stated in the case of *Commonwealth of Massachusetts* v. *Melon,* decided June 4, 1923, by this Court, 262 U. S. 447, 67 L. Ed. 1078.

When the courts assume jurisdiction in advance of a law being finally enacted by the legislative department of the government of the state, the republican form of government is destroyed. A construction of a state law, or the provisions of a state constitution, ascribing to them a meaning which renders both the statute and constitutional provision repugnant to the Constitution of the United States and the Enabling Act renders both void.

We recognize that the Supreme Court of Arizona had the jurisdiction and power to reverse its former decision in

the case of *Warner* v. *White, supra,* and to declare the meaning of a constitutional provision to be directly opposite to its earlier declared meaning in said case. This, however, is not the question. The meaning ascribed to the constitutional provision in the case in the court below renders it repugmant to the Constitution of the United States and the Enabling Act, whereas the earlier meaning ascribed to the same language created no repugnacy. Being bound by the last declaration of the meaning of this provision of the Arizona Constitution, we have the court below abridging the privileges of petitioner and the people of Arizona of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature. We also have the court below, by its opinion, depriving petitioner and all taxpayers of Arizona of their property without due process of law by subjecting their property to taxation under the act in question, which was never finally passed by the legislative department of the government of Arizona. If the people, by the use of the referendum, should refer a law that could not constitutionally be referred, the courts would have jurisdiction to say so after the people had acted, not before they acted and not while they were in the process of acting. It might be that the people would have approved the act of the legislature, and if the people did approve it, then there would be no question for the court to decide.

The assumption by the court of jurisdiction, power and authority to determine in advance of action by the people under their reserved power, by the use of the referendum, that an act of the legislature is one that might not be referred is tantamount to the assumption of the power of life and death over every measure. Such assumed power would limit the right of the people to refer only valid laws. Such assumed power would limit the right of the people

to refer only laws which the court of last resort had already declared to be valid. In other words, every initiated or referred measure, prior to its being voted on by the people, could be attacked in the courts as to its constitutionality or validity. Under the theory of the lower court in this case, the court would pass upon such constitutionality or validity before the legislative processes had been completed. The very statement of this proposition shows the unsoundness of the decision of the court below.

The effect of the decision is to say not only that the courts may do this, but that a mere ministerial officer may disregard the decisions of the court of last resort and do so.

What we have just said was said in other language in the opinion of the court in *State* v. *Osborn, supra,* which we quote:

> "The government of the state is divided into three separate departments, the legislative, the executive, and judicial, and it is provided by the Constitution (article 3) that:
>
> 'Such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.'
>
> "In Allen v. State, 14 Ariz. 458, 130 Pac. 1114, 44 L. R. A. (N. S.) 468, we said:
>
> 'The people did not commit to the Legislature the whole lawmaking power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes. In this state the Legislature and the people constitute the lawmaking power.'
>
> "The appellant concedes that the courts are powerless to restrain a member of the Legislature from intro-

ducing any measure, valid or invalid, for the reason that the courts cannot interfere with the action of the legislative department. What legal warrant has a court to enjoin the Secretary of State from certifying a measure whether valid or invalid? Is not the initiative petition also a step in the process of legislation? For the Secretary of State, or the courts, to assume in advance the power and right to decide whether the proposed measure was invalid would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other lawmaking body, the Legislature, would go untrammeled as to the legal soundness of its measures. Such differentiation of powers is expressly prohibited by section 14, article 22, Constitution, which says:

'Any law which may be enacted by the Legislature under this constitution may be enacted by the people under the initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.'

"This certainly means that the power of the people to legislate is as great as the power of the Legislature to legislate, and for the courts to assume a supervision of one of the lawmaking bodies, and require that measures proposed by it must first receive judicial sanction before action by that body, while the other may proceed without let or hindrance, is not in accordance with the letter or spirit of the Constitution."

VI

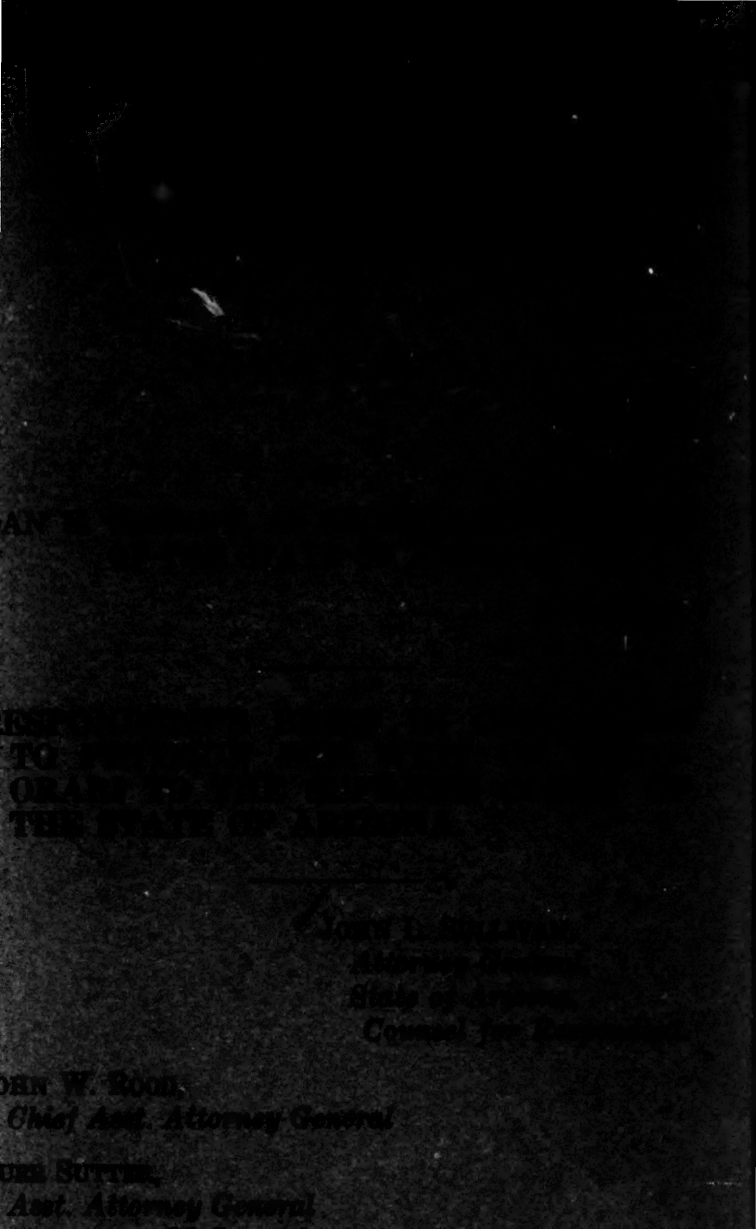
Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that substantial justice shall be done to the people of Arizona, as well as to these parties, and that

to such an end a Writ of Certiorari should be granted, and that this Court should review the decision of the Supreme Court of Arizona and finally reverse it.

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(7073)



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 605

WILMOT W. TREW,

Petitioner,

vs.

DAN E. GARVEY, AS SECRETARY OF STATE OF THE STATE OF ARIZONA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Proposition No. I

I. Lack of federal question.

A. There is no federal question in this proceeding to be determined by this court.

B. A federal question must appear affirmatively from the record before a writ of certiorari may be issued by this court.

C. The federal question, if any, must be raised before final judgment in the state supreme

court, and comes too late in a motion for rehearing in the state court.

Proposition No. II

II. Guarantee of republican form of government not a judicial question.

A. The decision of the Supreme Court of Arizona in Garvey, Secretary of State, v. Trew, 170 Pac. (2d) 845, does not destroy the republican form of government in Arizona. In fact, such decision was issued in pursuance of and furtherance of the republican form of government adopted by the people of the State of Arizona in the constitution of that state.

B. The enforcement of the guarantee of a republican form of government is not a judicial matter, rather it is legislative and political.

Proposition No. III

III. Due process of law.

A. The original pleadings must aver that the due process clause of the federal constitution is infringed when the state constitution contains a due process clause.

B. The due process clause of the federal constitution (14th Amendment) does not control methods of state procedure.

Proposition No. IV

IV. The question here presented has become moot.

A. No actual controversy here exists because:

1. The measure sought to be referred, Chapter 11, House Bill No. 20, 17th Legislature of Arizona, 1st Special Session, has not been published in publicity pamphlets as required by law.

2. Not having been published, the measure cannot be referred in the 1946 general election held on November 5, 1946.

3. The relief here sought is to compel the filing of the referendum petitions in order to place said measure on the ballot for the general election, and the general election has been held prior to this time.

4. The secretary of state is without power to publish publicity pamphlets relating to said measure at any subsequent general election.

B. The court will not consider a question when some intervening event has rendered the question moot.

1. The passage of time within which the pamphlets could have been published has intervened, and the question is moot.

2. The question raised in this case can only affect a certain election, and, since the election date has passed, the question is now moot.

3. The court will take judicial note of the election laws of the several states.

Proposition No. V

V. Submission of referred measures to vote.

A. The secretary of state is without power or authority to certify a measure to the ballot, which measure is not within the class of measures permitted by the state constitution to be referred.

B. The state courts have the right to pass on the referableness of measures prior to their being voted upon.

C. The meaning attributed to a state constitution and statutes by the state courts must be accepted by the United States Supreme Court as though it had been specifically expressed in the statute.

OPENING STATEMENT

The petition filed herein is a classic example of the delaying tactics frequently used by a litigant who is dissatisfied with the decision of a state court of last resort. Petitioner's request for review by this court is an imposition by him upon the Supreme Court of the United States, since his specifications of error and argument are so lacking in merit as to be frivolous and unworthy of consideration by this august tribunal. Respondent relies on the legal propositions set forth in this, his Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT ON PROPOSITION No. I

There is no federal question involved in this proceeding. The only matter before the Supreme Court

of Arizona and the only one decided by it related to the construction of Chapter 11, 1st Special Session, Laws of 1945, and Article IV, part 1, Section 1 (3), Constitution of Arizona. In the absence of a federal question, being properly presented in the state court, this court is without jurisdiction to consider it. *Herndon v. Georgia*, 295 U. S. 441, 79 L. ed. 1530, 55 Sup. Ct. 794. This is true even though a writ of certiorari has already been granted, since the writ must be dismissed where no federal question is involved. *Missouri Pacific R..R. Co. v. Hanna*, 266 U. S. 184, 69 L. ed. 235, 45 Sup. Ct. 36; *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. ed. 231, 53 Sup. Ct. 98, 86 A.L.R. 298.

A question raised for the first time in the Supreme Court of the United States will not be considered by it, and it must appear from the record that the constitutional question relied on by the petitioner was presented to or passed upon by the state supreme court. *White River Lumber Co. v. Arkansas ex rel. Appelgate*, 279 U. S. 692, 73 L. ed. 903, 49 Sup. Ct. 457. There is nothing in the record before this court which indicates that a federal question was presented to or decided by the Supreme Court of Arizona. The mere fact that petitioner has attempted to raise a federal question in his specifications of error and argument is insufficient to vest this court with jurisdiction of the proceedings.

Furthermore, a federal question first raised on petition for rehearing in the state supreme court is too late. *American Surety Co. v. Baldwin*, supra; *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 33 Sup. Ct. 510, 57 L. ed. 857.

ARGUMENT ON PROPOSITION No. II

Although petitioner failed to raise any federal question in the court below, he has attempted to do so in his petition for a writ of certiorari, wherein he claims a destruction of the republican form of government in Arizona and a deprivation of property without due process of law. These matters will be treated separately by respondent.

Throughout his specifications of error and argument, petitioner has repeatedly alleged that the decision of the Supreme Court of Arizona in *Garvey, Secretary of State, v. Trew*, 170 Pac. (2d) 845, destroys the republican form of government in Arizona, contrary to the guarantee set forth in Article IV, Section 4, Constitution of the United States, as follows:

> "The United States shall guarantee to every state in this union a republican form of government. * * "

Petitioner's contention is without merit, having no basis in law or in fact. An examination of the record reveals that the Supreme Court of Arizona, in rendering such decision, was merely performing its duties as prescribed by law. That court is a constitutional court, the members of which are elected by the voters of the state as provided by law. One of the necessary functions of such a body under our system is the construction of the provisions of the constitution, the same constitution by which the court was created. In interpreting Article IV, part 1, Section 1(3) of the Constitution of Arizona, the supreme court of that

state was exercising a judicial function in a manner required by the fundamental law itself. The situation is similar to that existing in *In re Duncan, Petitioner*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. 573, wherein it was said:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves set bounds to their own power, as against the sudden impulses of mere majorities."
>
> * * * * * * * * *
>
> "The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction."

If the supreme court were in error in arriving at its decision, that error could have been corrected, and may still be corrected, by the ordinary processes of

legislative enactment or amendment to the constitution.

In *Taylor v. Beckman*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. 890, 1009, a writ of error was granted by this court to review a decision of the Supreme Court of Kentucky, in which that court had construed certain Kentucky statutes relating to election contests for state executive officers. It was contended by the disgruntled, ejected officeholders that the Kentucky decision destroyed the republican form of government in that state. This court refused to consider such objection and dismissed the writ with the following remarks:

> " * * * The Commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the General Government to enforce the guarantees of the Constitution, or to repel invasion, or to put down domestic violence. In the eye of the Constitution, the legislative, executive and judicial departments of the State are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests. This very case shows that this is so, for those who assert that they were aggrieved by the action of the General Assembly, properly accepted the only appropriate remedy, which under the law was within the reach of the parties. That this proved ineffectual as to them, even though their grounds of complaint may have been in fact well founded, was the result of the constitution and laws under which they lived and by which they were bound. Any remedy beside that is to be found in the

> august tribunal of the people, which is continually sitting, and over whose judgments on the conduct of public functionaries the courts exercise no control.
>
> "We must decline to take jurisdiction on the ground of deprivation of rights embraced by the Fourteenth Amendment, without due process of law, or of the violation of the guarantee of a republican form of government by reason of similar deprivation.
>
> "As remarked by Chief Justice Taney in *Luther v. Bordon*: 'The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.' "

Furthermore, even though the decision of the Arizona court did act to destroy the republican form of government, it has long been settled that the enforcement of the guarantee contained in Article IV, Section 4, Constitution of the United States, is a legislative question for Congress, rather than a judicial matter for the courts, which lack jurisdiction to consider such objection. *Luther v. Borden*, 7 Howard (48 U. S.) 1, 12 L. ed. 581; *Texas v. White*, 7 Wallace

(74 U. S.) 700, 98 L. ed. 227. This doctrine has been reiterated on numerous occasions by this court and is well stated in *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, 74 L. ed. 710, 50 Sup. Ct. 228, 66 A.L.R. 1460, as follows:

> "As to the guaranty to every state of a republican form of government (§4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; O'Neill v. Leamer, 239 U. S. 244, 248, 60 L. ed. 249, 263, 36 Sup. Ct. Rep. 54; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N.C.C.A. 927."

ARGUMENT ON PROPOSITION No. III

Respondent has already pointed out that no federal question of any nature was presented to the courts below.

In regard to petitioner's contention that the decision of the Arizona court operates to deprive him of his property without due process of law, he must originally raise that question in the lower court, and in the event the state constitution contains a due process clause, his original pleading in the trial court must contain an averment referring specifically to the Constitution of the United States. The original pleading in this case did not contain such an averment. In the absence of this averment petitioner has no basis for

invoking the jurisdiction of this court, for a bare allegation that due process of law is lacking will be construed as referring to the state provision rather than the federal. *Bowie v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. 769; *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 33 Sup. Ct. 510, 57 L. ed. 857. Further, in petitioner's original complaint no mention was made of the due process clause of either constitution.

The Arizona Constitution contains the following provision, Article II, paragraph 4:

> "No person shall be deprived of life, liberty or property without due process of law."

In addition to the above arguments, petitioner's complaint seems squarely within the opinion of Chief Justice White in *McDonald v. Oregon R. R. & Navigation Co.*, 233 U. S. 665, 58 L. ed. 1147, wherein the chief justice said:

> " * * * It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character. So far as the contentions addressed themselves to the subject-matter of jurisdiction, it is clear that they do not deny jurisdiction in the sense of the fundamental absence of any and all right to take cognizance of the cause, but are confined to jurisdiction in the sense of the duty to rightfully decide subjects to which judicial

> power extends. In this aspect the error of all the contentions is within the principle announced in Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229."

Essentially, that is petitioner's complaint. The methods of procedure whereby he seeks to have his referendum measure certified to the ballot are methods of purely state procedure, and because the lower court did not approve his methods or reasoning, he contends he is deprived of his property without due process of law. Such a position is absurd.

ARGUMENT ON PROPOSITION No. IV

It has been well settled that the Supreme Court of the United States will not take jurisdiction over a matter when no actual controversy exists. Without any reference for the moment to the other matters which respondent relies upon as demonstrating that this court will not take jurisdiction of this action, respondent believes that since the judgment of this court can have no legal effect, the entire matter has become moot, and, since this is so, a reversal of the judgment of the Supreme Court of Arizona will serve no purpose.

Article IV, part 1, Section 3 of the Constitution of Arizona, reserves to the people of Arizona the power of referendum of certain classes of legislative enactments. It was initially contended that the measure in question in this suit was not within the class of measures that are subject to the referendum. That contention was upheld by the Supreme Court of Arizona and will be discussed at a later point in this argu-

ment. However, for the present, that question is immaterial. Article IV, part 1, Section 11, Constitution of Arizona, provides that the texts of all measures submitted for referendum shall be published in the same manner as proposed amendments to the Constitution, and that method is to be followed until the legislature especially provides methods for the publication of referendum measures. Section 60-107, A.C.A. 1939, is legislation specially enacted to provide the method of publishing initiative and referendum measures and now supersedes Article IV, part 1, Section 11 of the Arizona Constitution. This Code section, as amended, provides that not later than the tenth day before the primary election, pamphlets containing the referred measure must be distributed to the precincts, and on the primary election day the election officials must offer one copy of said pamphlet to each voter as he presents himself to vote. However, during the war the required publicity pamphlets must be given to each county recorder seventy-five days before the regular election, which, in respect to the year 1946, would make the delivery date of the pamphlets August 22, 1946. The county recorders must then promptly mail one copy of the pamphlet to each registered voter.

This case, now sought to be brought to this court for review on this petition for certiorari, was decided prior to August 22, 1946, by the Arizona Supreme Court, and as a result of the decision in his favor, the secretary of state, Garvey, did not include the measure in question in the publicity pamphlets, and it has never been so included.

The legal effect of an omission of a secretary of state to include a measure in the publicity pamphlets

has been before the Arizona Supreme Court. It was held in the case of *Kerby v. Griffin*, 48 Ariz. 434, 62 Pac. 1141, that if the referred measure is not published in the pamphlet form required by law, it cannot be validly enacted by the people in the next general election. Thus it is seen that the measure petitioner seeks to have referred cannot be enacted at the general election on November 5, 1946, even if placed on the ballot. In this case, since the mandamus proceeding was to compel the Secretary of State, Garvey, to accept the measure for filing, and since that action was concluded in a manner adverse to the petitioner herein, it is obvious that the measure was never filed and therefore could not be placed upon the ballot of the general election of November 5, 1946.

The next question is whether the measure could be publicized at a later general election and then placed on the ballot. This has also been determined by the Arizona Supreme Court, in the case of *Sims Printing Co. v. Frohmiller*, 54 Ariz. 64, 92 Pac. (2d) 334. There it was held that the secretary of state was without power to publish publicity pamphlets pertaining to a referred measure which had been referred for a prior general election. To be specific, the secretary of state could not publish publicity pamphlets in 1938 which described a measure that should have been publicized for the 1936 election. So it follows that the measure sought to be referred in this suit could not be voted on in 1946 because it does not appear on the ballot and because it was not publicized seventy-five days before November 5, 1946. And it cannot be publicized for any subsequent general election.

A judgment of this court reversing the Arizona Supreme Court and ordering Garvey to file the petitions for referendum in this case would have absolutely no legal effect.

The general rule is that if, during the pendency of proceedings to review a judgment, an event occurs which renders it impossible for the reviewing court to grant any actual relief whatever, the court will not determine the questions litigated below but will dismiss the error or appeal. This applies to mandamus proceedings as well as others. 3 Am. Jur. 314.

Since the Supreme Court of the United States by its judgment could not order the secretary of state to publish the necessary publicity pamphlets and certify the measure to the ballot for the 1946 general election, the date of said election having passed by this time, it follows that the court cannot render any effective relief whatsoever.

At the date of filing this brief, the general election of November 5, 1946 has already passed into history. The holding of that election and the passage of the seventy-five day publication period are intervening acts which are due to a power beyond the control of either party. This court, in the case of *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, held that where the whole object of the suit was to secure a right to vote at an election, and since the voting day had passed, no relief within the scope of the bill could be granted. The court held that if its decree did not grant any effective relief, it would not proceed to formal judgment and would dismiss the appeal. That is precisely the situation here. Petitioner originally sought to compel

Garvey to file referendum petitions to be voted upon at the general election on November 5, 1946. By binding constructions of the applicable Arizona statutes by the Arizona Supreme Court, it has been held that the measure could only be voted upon at the general election held on November 5, 1946. That date having passed, the petitions for referendum cannot now have any effect.

In *Mills v. Green*, supra, this court held it would take judicial notice of the laws of the several states relating to the days of public elections, and thus this court knows judicially that the Arizona election was held on November 5, 1946.

Another case holding that where the course of an election is to be affected by this court's decree and the election has already passed, the question becomes moot, is *Richardson v. McChesney*, 218 U. S. 487, 54 L. ed. 1121.

For further cases holding this court will not render a decision when the question was moot, see *Fisher v. Baker*, 203 U. S. 174, 51 L. ed. 142, and *Gulf, Colorado & Santa Fe Ry. v. Dennis*, 224 U. S. 503, 56 L. ed. 860.

ARGUMENT ON PROPOSITION No. V

Petitioner argues with great force that since his original pleading in the trial court was predicated on Section 60-105, A.C.A. 1939, this case is confined to the sole issue of the legal sufficiency of the referendum petitions as to whether they conform with the requirements of law as to form and signature, and

that the court below was limited to a determination of that sole issue. He then says that for the Arizona Supreme Court to determine any issue as to whether the measure is subject to the referendum provision of the constitution is depriving the people of the State of Arizona of their reserved power to affirm or disapprove legislative enactments, and is thus an abridgment of the republican form of government guaranteed by Article IV of the Constitution of the United States and the Enabling Act.

At an earlier point in this brief we have discussed the question that problems as to the abridgment of the guarantee of the republican form of government are not judicial but legislative. We confine this portion of our argument to these questions: (a) Is the secretary of state obliged to refer to a vote of the people measures which the constitution specifically exempts from the referendum? (b) In advance of the enactment of such matters, do the courts have the power to determine their referableness?

Respondent believes that the secretary of state is wholly without power to refer to a vote of the people a measure which is specifically exempted from the referendum, and that if his position in that respect is attacked by judicial process, the courts of Arizona have a right to examine the propriety of his actions.

Petitioner seems unwilling to understand the distinction between initiative measures, which, although capable of being initiated, may be for some reason unconstitutional, and a measure which is specifically exempt from referendum. It seems to respondent that a clear distinction exists.

Petitioner concedes the power of the Supreme Court of Arizona to overrule previous decisions, and does not seriously question the soundness of the decision in this case as to the constitutional interpretation of Article IV, part 1 of the Constitution of Arizona. Yet that interpretation is the very essence of this proceeding, whether or not the secretary of state had the power or right to file the petitions. The Arizona Supreme Court said he did not. Yet this petition for certiorari seeks to review the jurisdiction of the Arizona court to make such an inquiry. This proposition was first raised by petitioner in his motion for rehearing, filed in the Arizona Supreme Court, which motion is incidentally a contumacious attack upon the Supreme Court of Arizona merely because it overruled a case which petitioner relied upon to sustain his position. The motion for rehearing is not printed in the record before this court but is a classic example of the type of scurrilous language which is occasionally employed by counsel, disgruntled that a court has rejected his view of the law.

Respondent does not propose to discuss the merits of the case in chief. The opinion of the Supreme Court of Arizona will stand as his advocate in that. However, there are several cases which will be cited to demonstrate that the action of the secretary of state was proper, and hence the judicial review of his action could properly sustain him. The Utah case of *White v. Welling*, 89 Utah 335, 57 Pac. (2d) 703, contains an apt discussion of the powers of the secretary of state in his ministerial capacity. We quote from the court's decision:

"We believe the following principles are appli-

cable in regard to the duty of the secretary of state under the first or preliminary state of procedure dealing with the matter of the application for petition copies as provided by title 25, chapter 10, R.S. 1933: (1) The secretary of state cannot pass upon the constitutionality of any proposed law, at least at this stage of the proceedings under the Initiative and Referendum Act. Threadgill v. Cross, 26 Okl. 403, 109 P. 558, 138 Am. St. Rep. 964; In re Initiative Petition No. 2, 26 Okl. 548, 109 P. 823; In re Initiative State Question No. 10, 26 Okl. 554, 110 P. 647; State v. Osborn, 16 Ariz. 247, 143 P. 117; State v. Kozer, 126 Or. 641, 270 P. 513. If the proposed law showed unquestionably and palpably on its face that it was unconstitutional—for instance, an attempt by the proposed law to abolish a constitutional office, board, or department—it is quite likely that this court would refuse to issue the mandamus on the theory that it would not compel the secretary of state to do something which would in the end be unavailing. State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; State ex rel. Cranfill v. Smith, 330 Mo. 252, 48 S. W. (2d) 891, 81 A.L.R. 1066; State ex rel. Davies v. White, 36 Nev. 334, 136 P. 110, 50 L.R.A. (N.S.) 195. (2) The secretary of state cannot, nor can this court in a mandamus proceeding, pass upon a question of merit, worth, wisdom, validity, or policy of any proposed law intended to be initiated. State v. Kozer, supra. (3) The acts required to be done by the secretary of state, at least under this stage of the procedure provided by the law, are ministerial, and he has no discretion, except in so far as to determine whether the document or instrument submitted and purporting to contain the proposed law to be initiated has the semblance of a law, *or is such a*

> *matter as is not properly the subject of the Initiative and Referendum Act.*
>
> * * * * * * * * * *
>
> (Italics ours.)

and,

> " * * * That is to say, the secretary of state would not be required, for instance, to submit to the people (a) something merely calling for their opinion or other belief; or (b) something which, if voted on favorably by the people, would not have any of the characteristics or attributes of a law; or (c) something which is so unintelligible, incomprehensible, incoherent, or meaningless that it will not permit of a determination as to whether or not, if passed, it would be a law; or (d) *some matter which was not contemplated by the Initiative and Referendum Act, such as a proposed amendment to the Constitution.* See Hodges v. Dawdy, 104 Ark. 583, 149 S. W. 656; Brazell v. Zeigler, 26 Okl. 826, 110 P. 1052."
>
> (Italics ours.)

Thus we see that the secretary of state, as a ministerial officer, may determine in that capacity when the law is incapable of being constitutionally referred.

A Montana case of *State v. District Court*, 106 Mont. 470, 78 Pac. (2d) 937, discusses the referableness of appropriation measures and police power measures in Montana. In that case the Secretary of State of Montana was restrained *prior to election* from certifying said measures to the ballot for a referendum vote. The injunction restrained the submission

of the measures, and the Supreme Court of Montana held that it would sustain the injunction as the measure was within the class of laws which are exempt from referendum, saying:

> "But one major question is before us for decision: Is the act within the exceptions contained in the constitutional provision, and thereby exempt from referendum? This question as it confronts us here contemplates and includes two minor questions: (1) Does the act relate to the appropriation of money, and (2) is it a law necessary for the immediate preservation of public peace, health, or safety? An affirmative answer to either of the minor questions commands an affirmative answer to the major question."

At a later point in the decision, the court held the act sought to be referred was not within the exemptions, but the quoted portion is pertinent to the point here urged. It is clear that the Montana court felt it had full power to decide the question of a measure's being properly referred *prior* to a vote of the people.

The same view was announced in the Nevada case of *Caine v. Robbins*, 61 Nev. 416, 131 Pac. (2d) 516. See also, 28 Am. Jur. 172, 173, sections 36 and 37.

In no sense can it be said that the action of the secretary of state or the court was an interference with the legislative department of Arizona. In refusing to accept the petitions the secretary of state was acting in full accord with the constitutional provisions and in aid and assistance of the legislative or law-making department, which provisions provide that bills enacted by the legislature for appropriations of the

character contained in this measure are not subject to the referendum. The action of the secretary and the court merely blocked interference with the constitutional law-making functions both of the legislature and of the people. Obviously, if a measure must be referred where the requisite number of signers are secured, and there is no power in the secretary or the court to stop such reference, the constitutional exception as to laws pertaining to peace, safety, etc. and appropriations would be wholly nugatory. The result would be that every measure passed by the legislature, even though with an emergency clause, would be referable.

The decision in this case relates solely to the meaning attributed to Article IV, part 1, Constitution of Arizona, and Section 60-105, A.C.A. 1939. These are purely state matters and in no manner give rise to any federal question. Petitioner has not pointed out any federal question other than that of an abridgment of the republican form of government and the due process clause in the federal Constitution, which points have already been discussed. The errors relating to these propositions are numbered 4, 5 and 6 of petitioner's reasons for the allowance of the writ of certiorari. Numbers 1, 2, 3, 7, 8, 9, 10, 11, 12 and 13 are all purely state matters and deal with the meaning and construction given various phases of the Constitution of Arizona and the Arizona statutes. This is readily apparent from reading the alleged assignments of error.

Since these questions are purely local and state questions, it is the well settled law of this court that the meaning attributed to the state constitution and sta-

tutes by the state court must be accepted as though it had been specifically expressed in the statute. As was so ably said by Mr. Justice Sutherland in *Supreme Lodge, Knights of Pythias, v. Meyer*, 265 U. S. 30, 44 Sup. Ct. 432, 68 L. ed. 885:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; Green v. Neal, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion. Carroll County v. United States, 18 Wall. 71, 82, 21 L. ed. 771, 775; Shelby v. Guy, 11 Wheat. 361, 367, 6 L. ed. 495, 496; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 143, 22 L. ed. 331, 334. * * * "

See also, *Supreme Lodge, Knights of Pythias, v. Eiser*, 265 U. S. 41, 44 S. Ct. 436, 68 L. ed. 891, and *Senna v. Tile Layers' Protective Union Local No. 5* 301 U. S. 468 Sup. Ct. 857, 81 L. ed. 1229.

We do not concede that any of the questions raised in petitioner's assignment of error are federal questions and believe that the above cited law applies to all thirteen assignments.

CONCLUSION

Based on the foregoing reasons, respondent submits that this court should properly deny petitioner's application for writ of certiorari.

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